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ALEXANDER L. STEVAS,
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

HOUSTON CHRONICLE PUBLISHING COMPANY,

Petitioner,

v.

THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE,
130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS,
SERVING BY SPECIAL APPOINTMENT,

Respondent,

BROWN & ROOT, INC. AND THE HALLIBURTON COMPANY,

Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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January 15, 1985

QUESTIONS PRESENTED FOR REVIEW

1. Whether the public and press have a right guaranteed by the First and Fourteenth Amendments to the United States Constitution to inspect non-confidential sworn deposition testimony and answers to interrogatories on file in pending civil litigation involving construction of the South Texas Nuclear Plant.

2. Whether a protective order denying the public and press access to non-confidential sworn deposition testimony and answers to interrogatories in the South Texas Nuclear Plant civil litigation, which was entered by the trial court without any findings of fact to establish good cause for closure, is repugnant to the right of access granted to the public and press by the First and Fourteenth Amendments to the United States Constitution.

3. Whether Rule 186b, Texas Rules of Civil Procedure, which as applied by Respondent would authorize entry of a protective order denying the public and press access to inspect non-confidential sworn deposition testimony and answers to interrogatories on file in the South Texas Nuclear Plant civil litigation, without an evidentiary hearing and without fact findings as to good cause, is repugnant to the access rights granted to the public and press under the First and Fourteenth Amendments to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals of Texas, Thirteenth Supreme Judicial District, is reported at 678 S.W. 2d 495 (Tex. Civ. App.-Corpus Christi, 1984). The Respondent's order denying access is an appendix to the Texas Court of Appeals opinion. The Texas Supreme Court did not issue an opinion.

JURISDICTION

The Texas Supreme Court entered an order on October 17, 1984 denying Petitioner's Motion for Leave to File a Petition for Writ of Mandamus. This petition for writ of certiorari is filed within ninety days of the entry of such order. Petitioner requests this Court to review the propriety of the lower court's order and

the validity of Rule 186b, Texas Rules of Civil Procedure, as applied by the court below, on the grounds that they are repugnant to the Constitution of the United States. Jurisdiction is properly invoked under 28 U.S.C. Section 1257(3)(1970).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition for writ of certiorari raises questions under the First and Fourteenth Amendments to the United States Constitution. The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. I.

Section 1 of the Fourteenth Amendment provides, in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1.

Rule 186b, Texas Rules of Civil Procedure provides, in relevant part:

> After notice is served for taking a deposition on written questions or by oral examination, upon motion reasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may enlarge or shorten the time for taking the deposition, or may make an order that the deposition shall not be taken, or that it may be taken only before the court or at some designated place other than that stated in the notice or

> subpeona, or that it may be taken only on written questions, or that it may be taken only on oral examination, or that certain matters shall not be inquired into, or that the examination shall be held with no one present except the witness and his counsel and the parties to the action and their officers and counsel, or that the deposition shall not be taken by or before the officer designated, or that after being sealed the deposition shall be opened only by order of the court or that secret processes, developments or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from undue annoyance, embarrassment, oppression or expense.[1]

STATEMENT OF THE CASE

The Houston Chronicle Publishing Company ("HCPC") seeks by this petition to protect and enforce its right to inspect non-confidential sworn deposition testimony and answers to interrogatories which have been filed by the litigants in a civil lawsuit involving the construction of a nuclear power generating plant in south Texas.

The HCPC is a newspaper publishing company which publishes a daily newspaper known as the *Houston Chronicle* (the "Chronicle"). The Chronicle is the largest circulation newspaper in the State of Texas. It primarily serves the area in and around Houston, and the Texas Gulf Coast. As part of its obligation to report news of importance and interest to its readers, the Chronicle has sought to report on the proceedings in the case of *Houston Lighting & Power Company, Individually and as Project Manager under the South Texas Project Agreement between the City of San Antonio, Texas, Central Power & Light Company,*

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[1] Rule 186b was repealed by the Texas Supreme Court effective April 1, 1984. Rule 166b, Texas Rules of Civil Procedure, replaces this provision.

Houston Lighting & Power Company and the City of Austin, Texas, executed as of July 1, 1973, as amended, et al. vs. Brown & Root, Inc., and Halliburton Company, Cause No. 81-H-0686-C, In the 130th District Court of Matagorda County, Texas (hereinafter the South Texas Nuclear Project Litigation).

The Plaintiffs in the South Texas Nuclear Project litigation are several municipalities or municipal utilities which banded together to construct a nuclear powered electric generating facility to provide for the future energy needs of south Texas. The South Texas Nuclear Project litigation is an action against Brown & Root and Halliburton Company, the architect/engineer, construction manager and constructor of the South Texas Project, for breach of their contractual obligations to build the facility. The South Texas Nuclear Project has been wrought with cost overruns and delays so that the cost of completing the plant has risen from its original estimated cost of less than $1 billion to more than $5.5 billion. The original schedule completion date was 1984. It is now hoped that the plant will open in 1989. These cost overruns and delays, as well as concerns over the safety of the plant, are the basis of the underlying litigation.

The Chronicle's readers are vitally interested in the outcome of the lawsuit. Most are utility ratepayers of Houston Lighting & Power, a regulated municipal utility serving the greater Houston area and the principal project participant. Houston Lighting & Power's rates are determined by the Texas Public Utility Commission in accordance with public law. Section 41(a) of The Texas Public Utility Regulatory Act provides that a portion of capital construction costs may be passed through to utility users. Art. 1446c, Tex.Rev.Civ.Stat. Ann. (1984 Supp.). The Act further provides as follows:

> Construction work in progress shall not be included in the rate base for major projects under construction to the extent

> that such projects have been inefficiently or imprudently planned or managed. Art. 1446c, Sec. 41(a).

During the past several years, the Public Utility Commission has granted Houston Lighting & Power's application to pass through the nuclear plant's construction cost overruns to its rate payers. Thus, Houstonians have subsidized the very inefficiencies and mismanagement which are the basis for the underlying lawsuit.

These rate increases have sparked a continuing public debate over the efficiency of nuclear generated electricity at the South Texas plant. That public discussion has been heightened by Houston Lighting & Power's most recent rate application before the Public Utility Commission which requested an increase in rates, including additional amounts to recover cost overruns of the nuclear project. On January 9, 1985, the PUC temporarily denied Houston Lighting & Power's application to pass through additional cost overruns and directed its staff to initiate a study of the "economic viability" of the South Texas Nuclear Plant. The South Texas Nuclear Plant civil litigation is a focal point of the public debate.

Respondent, the Honorable G. P. Hardy, Jr., presides over the South Texas Nuclear Project litigation. Since the suit's initiation, the parties have actively prepared their cases for the trial through the civil discovery process. Over 200 depositions have been taken and hundreds of interrogatories have been answered. During the discovery phase, the Defendants below and real parties in interest herein, Brown & Root, Inc. and The Halliburton Company, requested that Respondent enter a protective order under Rules 168 and 186b of the Texas Rules of Civil Procedure sealing *all* deposition transcripts and *all* answers to interrogatories from the public and press. The alleged basis for the Defendants' motion was the unsupported allegation that review of such testimony and sworn answers by the public and press would endanger their right to a fair trial.

Hearing on the Defendants' closure motion was held before Respondent on November 17, 1983. *No evidence* was tendered by any party in support of the motion for protection. The Chronicle's counsel attended that hearing and strenuously objected to the entry of any order which would abridge the right to inspect this discovery. Despite the Chronicle's objections, Respondent entered an Order dated December 29, 1983 denying public access to all of the depositions, interrogatories and answers thereto and requests for admissions and answers thereto. Respondent made *no factual findings* of "good cause". Rather, Respondent took judicial notice of certain "particular circumstances surrounding [the] cause" including:

> "1. The small size of Bay City, the town where the Court is located, and the proximity of the town to the South Texas Nuclear Project;
>
> 2. The unusually emotional nature of the issues involved;
>
> 3. The pretrial status of the suit; and
>
> 4. The complexity of the suit, and the enormous number of documents involved, which, if selectively disclosed to third parties by the parties or their attorneys, could present materially false impressions as to the merits of the claims and their likelihood of success and interfere with the right to a fair trial to which all parties are entitled."

The Court's Order denying the Chronicle access to the depositions and interrogatory answers was based upon the Respondent's conclusion that the public and press "have no constitutional nor common law right of access to pretrial documents obtained through the discovery process in a civil case."

On December 28, 1983, the Chronicle filed its Motion for Leave to File a Petition for Writ of Mandamus or Alternatively, Writ of Prohibition and accompanying petition with the Court of Appeals for the Thirteenth Supreme Judicial District of

Texas, Corpus Christi.[2] In an opinion dated April 12, 1984, mandamus was denied. *Houston Chronicle Publishing Co.* v. *Hardy* 678 S.W.2d 495 (Tex. Civ. App. — Corpus Christi 1984). The Chronicle then filed a Motion for Leave to File a Petition for Writ of Mandamus with the Texas Supreme Court. The motion was denied without comment on October 17, 1984.

REASONS FOR GRANTING WRIT

There is a direct conflict between the decision of the Texas courts herein and of various United States courts of appeals concerning the right of the public and press to inspect non-confidential civil pre-trial discovery documents. Specifically, there is an unreconcilable conflict between the Ninth Circuit's decision in *In re Coordinated Pre-Trial Proceedings*, 10 Med.L.Rep. 2430 (BNA) (9th Cir. October 5, 1984) and the Texas courts' orders. Accordingly, and pursuant to Rule 17.1(b), Rules of the Supreme Court of the United States, the review of the Texas courts' decision on certiorari is merited.

Review on certiorari is also merited pursuant to Rule 17.1(c), United States Supreme Court Rules, in that the Texas courts herein have decided an important question of federal law — the right of access to non-confidential discovery in civil cases of high public interest — that has not been, but should be, settled by this Court. Further, review is merited under Rule 17.1(c) in that the Texas courts' closure order conflicts with the reasoning in this Court's decision of *Seattle Times* v. *Rhinehart* ____ U.S. ____, 104 S.Ct. 2199 (1984).

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[2] At that time Respondent had issued no formal written order but had sealed all discovery by virtue of an informal order of a date unknown to the Chronicle. Respondent issued his written order the day following the filing of the Petition for Writ of Mandamus. The Chronicle then filed a supplemental motion and petition incorporating the written order.

ARGUMENT AND AUTHORITIES

I.
The Texas Courts' Decision Herein Directly Conflicts with Decisions of the United States Court of Appeals Recognizing a First Amendment Right of the Public and Press to Access Non-confidential Discovery Documents in Civil Lawsuits

II.
The Texas Courts Have Incorrectly Held that Petitioner Has No Right of Access to Non-confidential Discovery in "Civil Cases."

The Texas courts flatly rejected the contention that the public and press have a right guaranteed by the First Amendment to the United States Constitution to review non-confidential pretrial discovery documents on file in civil litigation. Respondent's Order states simply: "[T]hird parties have no constitutional nor common law right of access to pretrial documents obtained through the discovery process in a civil case." In affirming this order, the Texas Court of Appeals held that the decisions of this Court recognizing a constitutional right of access to judicial proceedings limit that right to criminal proceedings, and deny access to non-confidential discovery on file in civil cases.

In *Richmond Newspapers* v. *Commonwealth of Virginia*, 448 U.S. 555 (1980) and *Globe Newspaper Company* v. *Superior Court*, 457 U.S. 596 (1982), this Court established a clear right under the First Amendment to the United States Constitution of access by the public and press to criminal trials and proceedings. *Richmond* and *Globe*, the landmark decisions, represented only the initial steps in the development of standards which govern the public's and press' right of access to judicial proceedings. Although nothing in the First Amendment suggests that the public enjoys a right of access to criminal judicial proceedings, or that any such right of access is limited to criminal proceedings, this Court held that such access is necessary to the full enjoyment of the enumerated right to freedom of speech and freedom of the press.

> Of course this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment. But we have long eschewed any "narrow, literal conception" of the Amendments' terms, [citation omitted], for the Framers were concerned with broad principles and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights so that, while not unambigously enumerated in the varied terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. *Richmond Newspapers* v. *Virginia*, [citation omitted]. *Globe Newspapers Co.* v. *Superior Court*, 457 U.S. at 604.

Given these broad principles, it is not surprising that the right of access discussed by the Court in *Globe Newspapers* has not been limited to criminal trials. There is no doubt that the public's right to access judicial proceedings attaches prior to trial. In *Press-Enterprise* v. *Superior Court*, ____ U.S. ____ , 104 S.Ct. 819 (1984) this Court held that the public's First Amendment right of access was violated by a trial court order sealing the transcript of *voir dire* proceedings in a murder trial.

Moreover, this Court's decisions do not support the contention that the public's right of access is limited to criminal proceedings. Rather, the constitutional basis of the Court's recognition of a right of access to judicial proceedings is that public discussion of governmental affairs must be an informed one, free of unnecessary governmental restraint. The right is inherent in a self-governed society which values free speech. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enterprises* v. *Superior Court*, 104 S.Ct. at 824 citing *Richmond Newspapers* v. *Commonwealth of Virginia*, 448 U.S. at 572.

Based upon these precedents, several United States courts of appeals have recognized a First Amendment right of access of

the public to inspect civil pre-trial proceedings and discovery. E.g. *Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059 (3rd Cir. 1984) (public has a First Amendment right of access to hearings on pre-trial motions); *In the Matter of Continental Illinois Securities Litgation*, 732 F.2d 1302 (7th Cir. 1984) (public has a First Amendment right of access to documents tendered to court in support of a pre-trial motion); *Brown and Williamson Tobacco Corp.* v. *FTC*, 710 F.2d 1165 (6th Cir. 1983) (public has a First Amendment right of access to documents filed with the court in civil action); *Newman* v. *Graddick*, 696 F.2d 796 (11th Cir. 1983) (recognizing a right of access to documents on file in civil action involving overcrowding in Alabama prisons); *see also* "Access to Pretrial Documents Under the First Amendment, 84 Colum. L. Rev. 1813 (1984) ("Pretrial documents should be available to the press and public under the first amendment right of court room access developed in *Richmond Newspapers, Inc.* v. *Virginia* and subsequent cases"). Respondent's order denying the Chronicle access to the discovery sought herein conflicts with the principles enunciated by these decisions.

More importantly, the decision of the Texas Courts in the case at bar denying access to filed deposition transcripts and interrogatory answers is in direct conflict with the recent decision of the United States Court of Appeals for the Ninth Circuit in *In Re Coordinated Pre-trial Proceedings*, 10 Med. L. Rep. 2430 (BNA) (9th Cir. October 5, 1984) *petition for writ of mandamus denied, Mobil Oil Corporation* v. *Dow Jones*, No 84-851. The facts presented in the Ninth Circuit case and in the instant case are strikingly similar. There a newspaper intervened in a civil anti-trust suit to seek modification of a protective order which prevented the public from reviewing any pre-trial documents which any party deemed confidential. The trial court ruled that the discovery was presumptively open to the public

and established a procedure to be used in declassifying the documents. *In re Coord. Pre-Trial Proc. in Pet. Prod. Antitrust,* 101 F.R.D. 34 (C.D. Cal 1984). Thereafter, the trial court declassified several documents and made them available to the public and press for review. The court granted a stay of enforcement, however, pending appellate review. The newspaper then filed a petition for writ of mandamus with the Ninth Circuit seeking to lift the stay. The Ninth Circuit lifted the stay and granted the newspaper access to the discovery. In denying a petition for rehearing, the Court explicitly held that "[t]he public and press have the right to inspect public records and documents, including pre-trial judicial records and documents. The right of access is grounded in both the common law and the first amendment." *In Re: Coordinated Pre-trial Proceedings*, 10 Med. L. Rep. at 2430 (citations omitted). The court criticized the trial court's issuance of the "blanket protective order" and refused to stay disclosure of the documents. *Id.*

In reviewing similar facts, the Texas Courts in the case at bar have reached the exact opposite legal conclusion as the Ninth Circuit. The Ninth Circuit recognized that the public and press have a *qualified* right of access to review non-confidential civil discovery documents; the Texas courts denied that *any* right exists in civil litigation. The Ninth Circuit criticized the issuance of a blanket protective order sealing all pretrial discovery documents; the Texas courts approved and enforced such an order. The Ninth Circuit required that the trial court make specific factual findings on an evidentiary record to support a denial of access by the public to specific documents; the Texas Courts approved a closure order unsupported by any evidence of factual findings whatsoever.

Clearly the two decisions cannot rationally coexist. The starkness of the conflict, when viewed in conjunction with the legitimate concern that suppression of the information raises with

Texas residents in the instant case, suggests that the Court should review the decision on certiorari.

III.

The Texas Courts' Decisions Conflict with the Procedure Required for Protective Orders Announced by This Court in *Seattle Times Co.* v. *Rhinehart*.

The closure procedure authorized herein conflicts with the procedure suggested by this Court's in *Seattle Times Co.* v. *Rhinehart*, ____ U.S. ____ 104 S.Ct. 2199 (1984). In that case, this Court held that a Washington state trial court may properly prohibit a libel defendant from publishing confidential information about the plaintiff which it obtained during pre-trial discovery. The Court found that the protective order was narrowly drawn to satisfy the "good cause" requirement for protective orders contained in Washington's Rules of Civil Procedure and therefore, that it did not offend the First Amendment. Specifically, this Court said:

> We therefore hold that where, as in this case, protective orders entered *on a showing of good cause* as required by Rule 26(c), is limited to the content of pretrial civil discovery, and does not not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment. *Seattle Times Co.* v. *Rhinehart*, (emphasis added) ____ U.S. ____, 194 S.Ct. at 2209-2210.

Justice Brennan's concurring opinion correctly recognizes that "pre-trial protective orders designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment." *Seattle Times Co.* v. *Rhinehart*, ____ U.S. ____ 194 S.Ct. at 2210. (Brennan, J. concurring).

Prior to *Rhinehart*, there was little doubt that a trial court could prohibit disclosure of discovery materials to the public in

certain situations where "good cause" is demonstrated.[3] Such restrictions on access had been limited to circumstances when necessary to protect other constitutional rights of the litigants such as the right to privacy; *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) (citing cases); freedom of religion, or freedom of association; *Seattle Times* v. *Rhinehart* ____ U.S. ____, 194 S.Ct. at 2199; *Mills* v. *Alabama*, 384 U.S. 214 (1966); to prevent disclosure of national and security information or confidential trade secrets; *International Products* v. *Koons*, 325 F.2d 403 (2nd Cir. 1963); or to prevent disclosure of sensitive and potentially embarrassing information in domestic cases. *Nixon* v. *Warren Communications, Inc.*, 435 U.S. at 598; *Stamicarbon N.V.* v. *American Cyanamid Co.* 506 F.2d 532, 539-540 (2d Cir. 1974).

In *Rhinehart*, this Court was presented with an appropriate circumstance to permit protection. In that case, Rhinehart brought suit against the Seattle Times to recover damages for defamation and invasion of privacy arising from a series of articles the newspaper published about him in his capacity as spiritual leader of a religious group known as the Aquarian Foundation. The Aquarian Foundation also sought to recover

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[3] In order to etablish good cause, the Movants must meet the following three-pronged test by sufficient evidence offered on the record below:

(1) There must be a substantial probability that irreparable damage to movants' fair trial right will result if discovery documents are not sealed;

(2) There must be a substantial probability that the alternatives to closure will not protect adequately the right to a fair trial; and

(3) There must be a substantial probability that closure will be effective in protecting against the perceived harm.

Associated Press v. *United States District Court*, 705 F.2d 1143 (9th Cir. 1983); *In re Pulitzer*, 8 Media L. Rep. (BNA) 2227 (Fla. Cir. Ct. 1982); *Florida* v. *O'Dowd*, 9 Media L. Rep. (BNA) 2455 (Fla. Cir. Ct. 1983). *See also In re Halkin*, F.2d at 191. Further, the court must enter specific findings that good cause has been proven. *Id.*

damages from the newspaper for defamation and invasion of privacy, claiming that the articles discouraged contributions to the Foundation and misrepresented its spiritual activities.

The newspaper denied the allegations and sought extensive discovery of plaintiffs' claims. Among the requested discovery, the newspaper sought information relating to the Foundation's members and contributors during the past ten years. The Foundation refused to comply with the discovery request on the ground that disclosure of its members' and donors' identities would violate their First Amendment rights to privacy, freedom of religion and freedom of association. The trial court granted the Seattle Times' motion to compel discovery of the information. Plaintiffs then moved the court to enter a protective order preventing the disclosure of *any* information gained by the newspaper through discovery. The court refused to enter the protective order, stating that plaintiffs' claim that disclosure would violate their First Amendment rights was not supported by any showing of need. Plaintiffs filed a motion for reconsideration, in which they submitted affidavits of several Foundation members to substantiate their claim. The affidavits stated that disclosure of member and donor lists would adversely affect Foundation membership and would inhibit religious participation by existing as well as potential members. The affidavits described several letters and phone calls received by Foundation members threatening physical harm as well as actual attacks on Foundation members. Persuaded by these affidavits, the court issued a limited protective order, prohibiting disclosure *only* of the names, addresses and financial infomration regarding Foundation members, donors and clients. All other discovery remained open to the public.

Unlike the trial court in *Rhinehart*, Respondent in this case has issued an all-encompassing protective order, based upon nothing more than his apparent distrust of the public's ability to understand the information sought and his speculation regarding

the potential adverse effect of disclosure. Respondent accepted *no evidence* and issued *no fact findings* in support of his order. The order denying public access is based only upon the Court's judicial notice that the public might develop "materially false impressions" about the claims and defenses if allowed to review the sworn discovery. Respondent's reasoning offends our most established notions of free speech. The genius of our First Amendment freedoms is the recognition that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authorative selection." *United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943). We are committed to the principle that debate on public issues should be "uninhibited, robust and wide open". *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Moreover, in *Rhinehart* this Court balanced competing first amendment values in affirming the protective order. Rhinehart and the Aquarian Foundation had argued that the order was necessary to preserve their first amendment rights to freedom of religion and association. The Seattle Times argued that the order abridged its first amendment rights to free speech and freedom of the press. The Court's decision reflects a careful balance between competing first amendment interests. This Court recognized the general presumption of openness and access while approving an extremely narrow protective order designed to allow Rhinehart and its followers to pursue their religious and spiritual beliefs in private, without public interference. In the instant case, the Respondent failed even to search for, much less to find, any competing interests to support a restriction of first amendment rights. The civil litigants asserted only a vague and conclusory need to limit dissemination of discovery materials in order to preserve their right to a fair trial. No evidence was offered to support their claim that disclosure would prohibit the court's ability to empanel a fair and impartial jury.

Our adversarial system has proven time and again that careful and searching *voir dire* examinations enable an advocate to discover twelve men and women who are willing and able to discharge their duty and decide highly publicized and emotional cases only on the evidence presented at trial. *See* e.g. *Berrios* v. *Agosto*, 716 F.2d 85, 92 (1st Cir. 1983). "[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every . . . case to an unfair trial." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 565 (1976). Moreover, the trial court has at its disposal several alternatives to denial of access which may be employed to diminish the perceived ill effects of pretrial publicity. These include change of venue, additional instructions to jurors and extensive voir dire examinations. In the instant case the court refused to consider any of these alternatives.

CONCLUSION

In seeking access to the deposition transcripts and answers to interrogatories in this case, the Chronicle does not seek to promote a public scandal. Nor does the Chronicle seek to "root through a tremendous pile of undigested documentary evidence assembled during the discovery process". *Houston Chronicle Publishing Company* v. *Hardy*, 678 S.W.2d at 499. It seeks only to review the testimony and answers that the parties and witnesses have sworn to under oath and filed with the court.

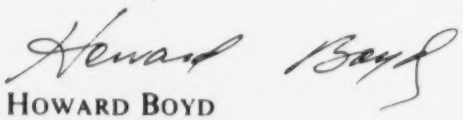
The residents of South Texas have been, and in the future may continue to be, called upon to pay the costs of the South Texas Nuclear Project. The controversy regarding these cost overruns is not simply a private matter or a private dispute between the named litigants. It is a matter of great public concern with direct public consequences. The testimony which has been given in this case to date, by way of deposition and interrogatory answers, undoubtedly contains information which is vital to the public's understanding and appreciation for this dispute. This information is the basis for public discussion of an issue which is not only societal concern but which will produce direct individual economic consequences. It certainly "lies near the heart of the information protected by the first amendment." *In re: Halkin*, 598 F. 2d 176, 198 (D.C. Cir. 1979).

The courts below held that the public and press's first amendment right to attend judicial proceedings and review judicial documents does not extend to civil cases. That ruling is in direct conflict with the Ninth Circuit's decision in *In re: Coordinated Pre-Trial Proceedings*, as well as with the analysis of this Court in *Seattle Times Co.* v. *Rhinehart*. The decisions below insure that the circumstances surrounding the construction of South Texas Nuclear Plant will not be subject to the type of open and uninhibited debate envisioned by the framers of the First Amendment, but rather will continue to proceed in private

without the benefit of public understanding, comment or scrutiny. For these reasons, a Writ of Certiorari should be issued to review the Order of the Supreme Court of Texas.

DATED and SERVED this 15th day of January, 1985.

Respectfully submitted,



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RULE 28 CERTIFICATE

I hereby certify that a true and correct copy of the foregoing petition for issuance of a Writ of Certiorari to the Texas Supreme Court was delivered to the counsel of record for all parties listed below by certified mail, return receipt requested this 15th day of January, 1985.

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